In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-522

FRED HORNSBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that a transfer of marijuana between co-conspirators is not a transfer within the meaning of the Marijuana Tax Act, and (2) that he was entrapped into committing conspiracy. The first question was raised by one of petitioner's co-defendants in his petition for a writ of certiorari now pending in this Court. See *Daniel J. Cochran* v. *United States*, No. 74-81.[1]

Petitioner, Cochran and several others were charged with conspiracy to acquire, transport, and conceal marijuana, in violation of 26 U.S.C. (1964 ed.) 4741-4744 (Count One); importation of marijuana , in violation of 21 U.S.C. (1964 ed.) 176a (Count Two); and transfer of

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[1]A copy of our memorandum in opposition in *Cochran* is being sent to petitioner's counsel.

marijuana, in violation of 26 U.S.C. (1964 ed.) 4742(a) (Count Three).[2] Petitioner, Cochran and co-defendant Register were convicted after jury trials in the United States District Court for the Northern District of Georgia.[3] Petitioner was sentenced to a term of five years' imprisonment on each count, the sentence on Count Two to run consecutively to the concurrent terms of imprisonment imposed on Counts One and Three. The court of appeals affirmed in an opinion on which we rely (496 F. 2d 1072; Pet. App. A).[4]

The facts of the case are not in dispute and were briefly summarized by the court of appeals (Pet. App. A, pp. 2a-3a):

> Register, Hornsby and Cochran, along with several others, organized and funded a scheme for flying a large amount of marijuana in from Jamaica. Unfortunately for them, Gilmore Sims, the pilot recruited for the job, informed the Bureau of Narcotics and Dangerous Drugs, enabling its agents to infiltrate the conspiracy thoroughly at an early stage. As testified to by undercover agents and co-conspirators who turned state's evidence, appellants provided funds and made arrangements for Sims to fly to Jamaica, pick up approximately 3,250 pounds of marijuana, and return.

Petitioner was arrested after the flight was completed.

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[2]The Marijuana Tax Act, 26 U.S.C. 4741-4744, and the Marijuana Importing Statute, 21 U.S.C. 176a, were repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 801, *et seq.*, effective May 1, 1971. The acts alleged in the indictment occurred during 1970.

[3]Register was tried separately and found guilty on each count of the indictment.

[4]The court of appeals affirmed the convictions of each appellant on all three counts of the indictment. Judge Gee, however, dissented from the court's affirmance of Counts One and Three (Pet. App. A, p. 2a).

1. Petitioner contends (Pet. 6) that his conviction on Count Three should be reversed because it is not possible for co-conspirators to "transfer" marijuana within the meaning of the Marijuana Tax Act. Petitioner did not move in the trial court to dismiss Count Three on this ground. Moreover, on direct appeal he did not challenge his conviction under Count Three.[5] He therefore cannot appropriately challenge it here. *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. We believe moreover, that the definition of "transfer" has insufficient continuing importance, in light of the repeal four years ago of the Marijuana Tax Act, to warrant plenary consideration by this Court.

In any event, the court of appeals properly construed the statute. The statutory definition of the term "transfer" includes "*any* type of disposition resulting in a change of *possession*," 26 U.S.C. (1964 ed.) 4761(4) (emphasis added), with the exception of transfer to a common carrier. The definition is very broadly phrased. Even if co-conspirators are viewed as "partners" and "agents" of each other, as petitioner urges, they are at most agents for purposes of ownership of the contraband. The statute, however, taxes transfers of possession, not transfers of ownership. Moreover,

> [t]he fact that Congress saw fit to exclude as a taxable event transfer to a common carrier is at least suggestive that all other changes in possession were within the congressional intent [Pet. App. A, pp. 22a-23a].

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[5]The issue was raised by the dissenting judge on the panel.

There is no sound reason to read the statute to proscribe ordinary transfers among individuals, while exempting transfers of possession among co-conspirators. To give the statute the reading suggested by petitioner would grant an unwarranted boon to those "wise" enough to add to criminal transfers a criminal conspiratorial agreement.

2. Petitioner also contends (Pet. 5-6) that the involvement of the government's undercover agents in the flight from Jamaica made it impossible for petitioner to be convicted of conspiracy. Apparently, petitioner argues that the actions of the government agents in the conspiracy serve to ratify the acts of the conspiracy. Relying upon this Court's opinion in *United States* v. *Russell*, 411 U.S. 423, the court of appeals correctly rejected this argument (Pet. App. A, p. 15a):

> [Petitioner's] second point, and the cases on which he relies for support, have been emasculated by the Supreme Court's decision in *United States* v. *Russell*, 411 U.S. 423 * * * (1973). There is no denying that the government so thoroughly infiltrated this conspiracy that, when the plane touched down in Georgia with its cargo of marijuana, only one of the four persons on board was not a government agent, and *he* later turned state's evidence. But this in no way indicates a lack of predisposition on the part of appellants. And we do not find the undercover tactics "* * * so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction * * *" 411 U.S. at 431 * * * .

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.